UNITED NATIONS

A

General Assembly

Distr.
GENERAL

A/CN.4/450
5 April 1993
ENGLISH
ORIGINAL: ENGLISH/SPANISH

INTERNATIONAL LAW COMMISSION
Forty-fifth session
Geneva, 3 May-23 July 1993

NINTH REPORT ON INTERNATIONAL LIABILITY FOR INJURIOUS CONSEQUENCES ARISING OUT OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW

by

Mr. Julio BARBOZA, Special Rapporteur

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I. INTRODUCTION

A. The mandate of the Special Rapporteur

1. In its most recent discussion, the Commission decided, with regard to the scope of the topic, that "Attention should be focused at this stage on drafting articles in respect of activities having a risk of causing transboundary harm and [that] the Commission should not deal, at this stage, with other activities which in fact cause harm". Accordingly, "... the articles should deal first with preventive measures in respect of activities creating a risk of causing transboundary harm". Thus, the Special Rapporteur was requested, in his next report to the Commission, to "examine further the issues of prevention only in respect of activities having a risk of causing transboundary harm and propose a revised set of draft articles to that effect". 1/

2. These discussions mean that the discussion of whether rules of prevention are needed is suspended for the time being; there will be articles on this topic, on the binding nature of which we will take a decision, not now, but at a later stage. It also means that our discussions should be limited to the draft texts on prevention, and should not be extended to the topic of liability, which will be considered in due course.

3. The Commission's decisions also mean that, subject to the results of the discussion, the draft articles should be transmitted to the Drafting Committee as soon as possible so that they can be expedited, inasmuch as there have already been three discussions concerning specific articles on prevention: one relating to the fifth report of the Special Rapporteur (A/CN.4/423), one relating to the sixth report (A/CN.4/428), which incorporated numerous comments from the previous discussion and, lastly, a third one relating to the eighth report. We cannot expect to give the Drafting Committee even more material with which to carry out its task.

B. Some comments on prevention

4. In the previous report, we examined the nature of prevention in the context of activities involving risk, as follows:

> "We had seen that the preventive measures to be taken by the State would be very different from those to be taken by individual operators: the State would have to set forth a prudent and comprehensive set of rules (including laws and administrative regulations) in respect of prevention, and would have to monitor their implementation by the legal means at its disposal. Individuals would have to adopt whatever substantive measures the State forced them to adopt." 2/

1/ Official Records of the General Assembly, Forty-seventh Session, Supplement No. 10 (A/47/10), paras. 346 and 349.

2/ A/CN.4/443, para. 14.

5. The aim of such measures would be to attempt to ensure that activities under the jurisdiction or control of a State are carried out in such a way as to minimize the probability of an incident occurring which would have transboundary effects, and to reduce the harm resulting from each incident (in other words, not only less risk of harm, but also less risk of less harm), and, once an incident with transboundary effects has occurred, to attempt, within the State's sphere of action, to reduce, limit or control the harmful effects.

6. We underscore to attempt in order to show that the purpose of the obligation is not to prevent the occurrence of any harm - which, by definition, is problematic, since the activities involved are those which create a risk - but to compel the adoption of particular measures in order to achieve the above-mentioned results. Thus, the State will not, in principle, 3/ be liable for private activities in respect of which it carried out its supervisory obligations, namely, where it granted prior authorization upon completion of the steps required by the relevant articles, notified those presumed to be affected, held the requisite consultations, promulgated legislation which was reasonably designed to achieve the desired ends and exercised proper administrative control (requested operators to submit reports, carried out inspections, etc.).

7. Although we are examining the steps required for prevention, as set out above, we should point out that the obligations of prevention constitute what are called "due diligence" obligations, which are deemed to be unfulfilled only where no reasonable effort is made to fulfil them. Therefore, they would not have the nature which we would initially be tempted to ascribe to them, namely, that of obligations of result in the sense of articles 21 and 23 of Part One, and more specifically of article 23, requiring the prevention of a given event. The Commission itself warns that we should not confuse the two types of obligations in a report on Part One of the draft articles on State responsibility:

> "Obligations requiring the prevention of given events are therefore not the same as those that are commonly referred to by the blanket term obligations of due diligence. The commission of a breach of the latter obligations often consists of an action or omission by the State and is not necessarily affected by the fact that an external event does or does not take place." 4/

8. It is chiefly in relation to the obligations of the State and its potential liability that the observed inequality between developing and developed countries would come into play. The point has repeatedly been made, here and in the Sixth Committee, that developing countries lack the financial resources and

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3/ We say "in principle" because the State might have residual liability in some cases, for example, where the operator or his insurance cannot produce the sum required to cover the harm caused (as provided for in some conventions), or in other cases which might be imagined. That the State can have such residual liability, and what it consists of, will be dealt with when we consider the part on liability; we are only evoking that possibility; its existence and the manner of its realization will depend on the Commission's decision.

4/ Yearbook ... 1978, vol. II (Part Two), document A/33/10, p. 82, note 397.

technology required for monitoring the activities of multinational corporations, and that it is these corporations which are often responsible for activities involving risk. The Special Rapporteur shares this view, and proposes to include a text which, in general terms, can help to take that situation into account. The best place for it may perhaps be in the chapter on principles which guide the application of all the specific rules. Something will be stated, further on in this report, about the assistance which international organizations can provide to developing countries.

II. THE ARTICLES

A. General considerations

9. In the eighth report, the articles on prevention were numbered from 1 to 9, which was natural, since it had been proposed to send them to an annex and they had therefore been removed from the general numbering. As the possibility of setting up such an annex for this chapter was rejected by the Commission, we have to reincorporate them into that numbering. Since the Drafting Committee is considering draft articles 1 to 9, and since article 10 (The principle of non-discrimination) will surely be among those to be considered by that Committee, the first article on prevention should be numbered 11, and the following articles should be numbered accordingly.

10. We will transcribe first the texts proposed for the annex to the eighth report which were drafted not as recommendations, but as legal propositions, purged of references to activities having harmful effects, the consideration of which has been postponed to a later stage. Those texts, thus purged and drafted, will serve as a basis for the preparation of new articles taking into account, to the extent possible, the comments made in the discussions held last year, both in the Commission and in the General Assembly.

B. The texts

1. Article entitled "Preventive measures"

(a) Text:

11. As a basis for the formulation of this article, the Special Rapporteur has taken the text reproduced below, which closely follows article 1 of the annex:

"Preventive measures

"The activities referred to in article 1 shall require for their legal performance the prior authorization of the State under whose jurisdiction or control they are to be carried out. Before authorizing or undertaking any such activity, the State shall arrange for an assessment of any transboundary harm it might cause and shall ensure, by adopting legislative, administrative and enforcement measures, that the persons responsible for conducting the activity use the best available technology to prevent or to minimize the risk of significant transboundary harm."

(b) Basic principles:

(i) The obligation to cooperate

12. The first step is to assess the transboundary impact. As was stated in the eighth report of the Special Rapporteur, and before that in his fifth report, that obligation is closely linked to the obligations to notify, to inform and to consult, and all should be borne in mind when they are commented upon individually. One of the principles on which it is based is the principle of cooperation embodied in article 7 of this draft.

> "From the duty to cooperate flows, in the first place, a duty for the State to ascertain whether an activity which appears to have features that may involve risks or produce harmful effects actually causes such risks or effects. This means that the activity must be subjected to sufficiently close scrutiny to allow for definite conclusions to be reached." 5/

(ii) Prohibition against the harmful use of a territory

13. The other basic principle is the prohibition against the use by a State of its territory in a manner contrary to the rights of other States, which requires it to adopt all necessary measures to avoid such use.

> "The duty to cooperate is one basic principle, therefore; the other is expressed in the general rule emerging from the international case law frequently cited in this connection, namely, that the conscious use by a State of its territory to cause injury to another State is impermissible under international law. Let us recall, firstly, the Trail Smelter case: 'No State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein.' In the Corfu Channel case, the court referred to: '... every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States'". 6/

(c) Comments made in the previous discussion

14. The text of the annex combines the obligation to "assess transboundary impact" contained in former article 11 with the unilateral measures provided for in former article 16. A preference was expressed in the discussion for separate texts for each obligation, which is feasible. It was also suggested that the duty of a State to require individuals to obtain insurance to cover any eventual compensation should be retained in the chapter on prevention; that reference had been omitted and was to be included in the chapter on liability, since insurance does not prevent accidents, but simply covers the harm caused. The Special Rapporteur has no objection, either, to adopting this suggestion and including the topic in this article, since it is a step which the State will undoubtedly take prior to authorizing the activity, in other words, concurrently with the assessment of transboundary harm.

5/ A/CN.4/423, para. 76.

6/ Ibid., para. 78.

(d) Unilateral measures of prevention

(i) Prior authorization

a. General comments

15. Different views were expressed concerning the obligation of prior authorization. In general, the opinions were favourable, although one member of the Commission doubted the need to make it a binding obligation. Another member considered such an obligation unnecessary, believing that there was no country in the world which, to protect its own people, would not require prior authorization for hazardous activities and that, on the other hand, countries would rebel against it as a treaty requirement on the ground that it constituted interference in their internal affairs, a notion which was expressly rejected by another member. We do not think that such a requirement can be regarded as unlawful interference in the internal affairs of another State, since it is established to prevent the violation of the right of States to physical and territorial integrity. In order to show that it is unnecessary to establish such an obligation, it has been argued that it is the people or the environment of the State of origin which is the first to be harmed by a hazardous activity and that, in the end, it is that State which has a primary interest in requiring prior authorization. In the first place, however, it should be noted that the affected State is not going to view itself as having been compensated for the harm which it has suffered by the fact that the State of origin may also suffer as a result of activities carried out in its territory; secondly, such damage to the territory of a State does not exempt it from the prohibition against the use of its territory in a manner contrary to the rights of third States. 7/ Moreover, there may be cases in which an activity causes harm totally or partially outside the territory of a State, so that its people or environment would not be affected, or would be affected to a far lesser extent than that of a neighbouring State. One example of the first case would be a facility located next to a border, the emissions of which would be carried to neighbouring territory by steady winds, or on the bank of a river which carries the pollution directly to the neighbouring country without affecting the part of the river adjacent to the State of origin. The second case can be exemplified by a hazardous waste dump also located next to an international border; the harmful effects could, in part, be transferred abroad. These examples are in no way drawn from the Special Rapporteur's imagination, but from real life and international practice. Accordingly, the fact that the State of origin is usually the first to be injured cannot, in principle, be invoked to exempt it from its obligation to consider the rights of potentially affected States.

16. It has also been stated that in some cases it would not be feasible to assess the transboundary impact of particular activities. Without needing to approach the affected State, it is possible, in a large number of cases, to consider whether an activity which has particular features that involve risk is liable to cause transboundary harm, through a simple assessment of the substances handled or the technology used in it, or a general knowledge of the neighbouring territory, which is sufficient to enable one to determine, without the need for a special visit, whether a particular activity could harm especially vulnerable or protected areas. If that is not possible, then the

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7/ The Corfu Channel and Trail Smelter cases, etc.

cooperation of the affected State would obviously be required for the on-site missions which could allow for definite conclusions to be reached regarding the risk entailed by the activity. To that end, the participation of the affected State must be ensured through notification, exchanges of information and consultations. If the State presumed to be affected refuses admission to its territory or in any other way impedes the efforts of the persons sent by the State of origin, there will clearly be no ground for complaint if harm results from such refusal.

b. Existing activities

17. If we take the case of an activity which has been going on for some time in the country of origin without prior authorization having been granted, for some reason, and which comes to the attention of the State as an activity presumed to be hazardous, the State concerned must request the operator to apply to the competent bodies for the requisite authorization, using the same procedures as for the authorization referred to in article 11.

c. Failure to suspend the activity

18. Should the territorial State order the suspension of the activity while awaiting the fulfilment of the procedure obligations: notification, and especially, consultation with the affected State or States? The majority view in the Commission appears to be against this. There may be some abstract logic in suspending the activity until all the obligations of prevention have been fulfilled in an ideal way - in other words, with the participation of the affected party or parties - but we should recall that many voices were raised in this Commission and in the General Assembly against any possibility that the affected parties should be granted a virtual veto, as would be the case if international bodies decreed that the activity should be suspended. In order to comply with this expressed wish, the best solution might be to authorize the territorial State to initiate or to continue the activity while extending its guarantee to cover any transboundary harm which the activity might produce, as stipulated in the chapter on liability.

d. The concept of prevention

19. We have considered, up to this point, the amendments proposed during the discussion. In article 14, the wording of former article 1, *in fine*, of the annex is changed slightly. The concept of prevention is introduced in the sense of: (a) minimizing the risk of the occurrence of transboundary harm, in other words, reducing the frequency of accidents; (b) minimizing - if possible - the magnitude of the potential harm, for example, by replacing, in the handling of the activity, a very powerful element which is liable, ultimately, to have a major impact with another, less powerful one, even if that does not change the statistical frequency of accidents. This dual function would be in keeping with the definition of risk proposed in the eighth report, namely, that it would encompass both dimensions: the combined effect of the probability of the occurrence of an accident and the severity of its impact; (c) containing or minimizing the harmful effects of an accident which has already occurred, for example, by adopting, where possible, in the territory where it has occurred, particular measures which can cushion the unleashed effect before it reaches the border, or adopting other measures which can help to contain such effects; this

constitutes the famous "prevention ex post facto" with which most agreements on civil liability deal.

(ii) Transboundary impact assessment

20. The requirement that a transboundary impact assessment should be carried out as a precondition for obtaining authorization from the State to carry out the activity is provided for in the Convention on Environmental Impact Assessment in a Transboundary Context, particularly article 2, paragraphs 2 and 3, thereof, and in article 4, paragraph 2, of the Convention on the Transboundary Effects of Industrial Accidents. The latter Convention also stipulates that such assessment and authorization are also required when a major change is proposed in the activity concerned. In the same connection, principle 12 of the principles on environmental impact assessment (EIA) of the United Nations Environment Programme (UNEP) states that:

> "When information provided as part of an EIA indicates that the environment within another State is likely to be significantly affected by a proposed activity, the State in which the activity is being planned should, to the extent possible: (a) Notify the potentially affected State of the proposed activity; (b) Transmit to the potentially affected State any relevant information from the EIA, the transmission of which is not prohibited by national laws or regulations; and (c) When it is agreed between the States concerned, enter into timely consultations." 8/

Similarly, principle 17 of the Rio Declaration on Environment and Development states that:

> "Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority."

(iii) Other unilateral measures

21. With regard to other unilateral measures, the Code of Conduct on Accidental Pollution of Transboundary Inland Waters requires States to take strict measures (according to safety standards using the best available technology) to prevent, control and reduce accidental pollution of transboundary inland waters, including measures to: (a) minimize the risk of damage and (b) mitigate and contain the damage from such pollution (sect. II, para. 1). Section III of the Code lays down the legislative and administrative measures to be taken by parties for the prevention, control and reduction of accidental pollution of the waters concerned and for the mitigation and containment of damage resulting therefrom (para. 1). The measures are required to promote the development and sound application of the best available technologies and their safe operation

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8/ Goals and Principles of Environmental Impact Assessment, adopted by the Governing Council of UNEP in decision 14/25 of 17 June 1987. See UNEP/WG.152/4, annex; also reproduced in UNEP/GC.14/17, annex III.

for efficient prevention, control and reduction of accidental pollution (para. 2). 9/

22. The Convention on Environmental Impact Assessment in a Transboundary Context states that: "the Parties shall, either individually or jointly, take all appropriate and effective measures to prevent, reduce and control significant adverse transboundary environmental impact from proposed activities" (art. 2, para. 1). This provision is very important because it means that the Convention requires the parties not only to assess the environmental impact, but also to prevent, reduce and control it. That is why this article is included in the remarks on unilateral measures (although in this case they are taken jointly with other States). This very general provision is followed by a more specific one:

> "Each Party shall take the necessary legal, administrative or other measures to implement the provisions of this Convention, including, with respect to proposed activities listed in Appendix I that are likely to cause significant adverse transboundary impact, the establishment of an environmental impact assessment procedure that permits public participation and preparation of the environmental impact assessment documentation described in Appendix II." 10/

23. Article 3, paragraph 1, of the Convention on the Transboundary Effects of Industrial Accidents states:

> "The Parties shall ... take appropriate measures and cooperate within the framework of this Convention, to protect human beings and the environment against industrial accidents by preventing such accidents as far as possible, by reducing their frequency and severity and by mitigating their effects. To this end, preventive, preparedness and response measures, including restoration measures, shall be applied".

Paragraph 3 states that "the Parties shall ensure that the operator is obliged to take all measures necessary for the safe performance of the hazardous activity and for the prevention of industrial accidents", while paragraph 4 states that "To implement the provisions of this Convention, the Parties shall take appropriate legislative, regulatory, administrative and financial measures for the prevention of, preparedness for and response to industrial accidents". 11/

24. The relevant provisions of the three above-mentioned instruments have been cited in preference to those of other instruments on liability for transboundary harm because they place special emphasis on prevention and contain the most modern thinking on the subject.

9/ E/ECE/1225; ECE/ENVWA/16, pp. 4-5.

10/ International Legal Materials, vol. XXX, No. 3, May 1991, pp. 803-804.

11/ International Legal Materials, vol. XXXI, No. 6, November 1992, p. 1335.

(e) Texts proposed by the Special Rapporteur to replace article 1 of the annex

25. To replace the text of article 1 of the annex, the following articles are proposed, taking into account the views expressed in the most recent debate.

"Article 11

Prior authorization

The activities referred to in article 1 shall require the prior authorization of the State under whose jurisdiction or control they are carried out. Such authorization shall also be required when a major change in the activity is proposed.

Article 12

Transboundary impact assessment

In order to obtain the authorization referred to in article 11, the territorial State shall order an assessment to be undertaken of the possible transboundary impact of the activity and of the type of risk that impact will produce.

Article 13

Pre-existing activities

If a State ascertains that an activity involving risk is being carried out without authorization under its jurisdiction or control, it must warn those responsible for carrying out the activity that they must obtain the necessary authorization by complying with the requirements laid down in these articles. Pending such compliance, the activity in question may continue on the understanding that the State shall be liable for any harm caused, in accordance with the corresponding articles.

Article 14

Performance of activities

The State shall ensure, through legislative, administrative or other measures, that the operators of the activities take all necessary measures, including the use of the best available technology, to minimize the risk of significant transboundary harm and reduce its probable scale or, in the event of an accident, to contain and minimize such harm. It shall also encourage the use of compulsory insurance or other financial guarantees enabling provision to be made for compensation."

2. Article entitled "Notification and information"

(a) Text:

26. As a basis for the formulation of this article, the Special Rapporteur has taken the text reproduced below, which closely follows article 2 of the annex:

"Notification and information

If the assessment referred to in the preceding article indicates the possibility of significant transboundary harm, the State of origin shall notify the States presumed to be affected regarding this situation and shall transmit to them the available technical information in support of its assessment. If the transboundary effect may extend to more than one State, or if the State of origin is unable to determine precisely which States will be affected, the State of origin shall seek the assistance of an international organization with competence in that area in identifying the affected States."

(b) General comments

27. There are many instruments requiring that notification be given in cases such as those provided for in the above draft article. Article 3 of the Convention on Environmental Impact Assessment in a Transboundary Context includes that requirement, as does the Convention on the Transboundary Effects of Industrial Accidents, implicitly in article 3, which provides for the need to inform those concerned, and explicitly in article 10. Principle 19 of the Rio Declaration on Environment and Development includes the same requirement:

"States shall provide prior and timely notification and relevant information to potentially affected States on activities that may have a significant adverse transboundary environmental effect and shall consult with those States at an early stage and in good faith."

(c) Participation of the affected State

28. As was explained in the fifth report of the Special Rapporteur and reiterated in the eighth report, the obligations regarding transboundary impact assessment, notification, information and consultation are closely linked and are all geared to an objective which is very important for the purposes of prevention, namely that of encouraging the participation of the State presumed to be affected so that it can help to ensure that the activity is carried out more safely in the State of origin and at the same time be in a position to take precautions in its own territory to prevent or reduce the transboundary impact. Cooperation is an essential part of these obligations and is one of the principles reflected in article 7 of the draft.

"We say that notification flows from the general obligation to cooperate because in some cases there is a need for joint action by both States, the State of origin and the affected State, if prevention is to be effective. Perhaps some measures taken from the territory of the affected State can provide protection and prevent effects arising in the State of origin from being transmitted to its own territory. Or perhaps the

cooperation of the other State is helpful for the exchange of information that may take place between the parties, especially if the other State possesses technology that is relevant to the problem at hand. Perhaps it is because a joint investigation is usually more productive than individual efforts. What this means then is that the participation of the affected State is necessary if prevention is to be genuine and effective and, consequently, it may be argued that the obligations of the State of origin to agree to such participation have the same purpose." 12/

(d) Promotion of special regimes

29. Notification serves another purpose connected with one of the objectives of the draft articles, namely the promotion of special regimes governing specific activities. When a State authorizes an activity involving risk to be carried out, the ideal solution would be for an agreement to be reached between that State and the potentially affected States on a special regime which takes into account the specific characteristics of the activity and establishes specific preventive measures, including possible provision for compensation.

"The first step towards a regime has been taken, therefore, with notification ... The participation of the affected State in this process is also desirable from the standpoint of the State of origin, which presumably has an interest in finding a legal regime to govern an activity involving risk ... for which it is responsible ... The purpose of the regime towards which we are moving with the obligation of notification would be not only to prevent accidents but also to strike a balance between the interests of the parties by introducing order into a whole array of factors. For example, a decision could be taken on preventive measures which weighed their costs against the costs of accidents and the benefits of the activity, the magnitude of the risks involved in the activity, the economic and social importance of the activity, possible sharing by each of the States of the costs entailed by the operations - where there is agreement that certain costs are to be shared - the objections which might be raised to these obligations, and so on." 13/

(e) Participation of international organizations

30. Various comments were made in connection with this article, both in favour and against intervention by international organizations and in relation to the form such intervention should take. Opinions ranged from total scepticism about its value to support for much greater involvement, notably with reference to the situation of developing countries. There are undoubtedly organizations capable of providing the assistance which developing countries might request from them, since they are already doing so at present in many similar fields and have ample capacity to meet any such requests. Upon further reflection, however, the question to be considered appears to be a different one, namely: to what extent can our articles oblige a body of this kind to make such assistance available? It is not the willingness of such bodies to provide assistance that is in

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12/ A/CN.4/423, para. 77, p. 27.

13/ Ibid., paras. 100 and 101, p. 33.

question; we need to consider what effect it would have if an instrument to which a certain number of States are parties were to establish an obligation requiring international organizations not parties to the instrument to provide aid. An instrument of this kind could be binding only on its parties and the most that could be done would be to stipulate that, if one State requests the intervention of an international organization, the other State may not oppose that request, provided the organization accepts the role assigned to it.

31. In this connection, it was suggested that the precedent offered by articles 202 and 203 of the United Nations Convention on the Law of the Sea should be used. Article 202 concerns scientific and technical assistance to developing States and reads: "States shall, directly or through competent international organizations, promote programmes of scientific, educational, technical and other assistance ...". This is clearly an obligation for States parties, with which they can comply by acting directly or through international organizations. It is taken for granted that the organization concerned will agree to comply with the request from the State in question. There may be various reasons for that assumption, including the fact that the organization's statute may require it to comply with requests from a State which promotes its activities. Article 203, however, requires international organizations to give preferential treatment to developing States in the allocation of appropriate funds and technical assistance and the utilization of their specialized services. As we understand it, this is an obligation for international organizations which are parties to the Convention pursuant to article 305, paragraph 1 (f), and within the limits set by the provisions of annex IX. This is not the case in our articles, which make no provision for international organizations to become parties. The Special Rapporteur is open to any suggestions which might be put forward on this question, but confesses that, after introducing proposals on the role of international organizations in this field on a trial basis, he fails to see how such organizations could be subject to legal obligations under an instrument to which they are not parties. The wording of former article 2 would reflect the concerns expressed above, since it indicates to States of origin that they may try to avail themselves of the assistance of a competent international organization in identifying the States presumed to be affected. In suggesting the drafting in question, the Special Rapporteur had in mind the UNEP Global Environment Monitoring System (GEMS) whose objectives are: to make comprehensive assessments of major environmental issues and thus provide the scientific data needed for the rational management of natural resources and the environment; and (b) to provide early warning of environmental changes by analysing the monitoring data. 14/ Other international organizations and programmes have studied and gathered data on questions such as the environment, the protection of human health from transboundary impact, and so on, which could undoubtedly help the developing countries to acquire a better understanding of these issues. The organizations concerned include the Economic Commission for Europe through its own committees and in conjunction with the Food and Agriculture Organization of the United Nations (FAO), the World Health Organization, the United Nations Development Programme or UNEP; FAO in its own right, the World Meteorological Organization,

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14/ See document on the Global Environment Monitoring System published by UNEP.

the International Atomic Energy Agency, the Organisation for Economic Cooperation and Development, and others.

(f) Other comments

32. One worthwhile comment was made stressing the need to introduce some idea of urgency as regards the time period within which the State of origin should provide notification. This idea appeared in the draft version of article 11 contained in the sixth report, which stipulated that States should provide notification "as soon as possible", and could be reintroduced in our article 15.

33. There were some who felt that, in cases such as the launching of a satellite, it might be impossible to notify all those concerned or conduct a transboundary impact assessment. Needless to say, notification of all concerned and the assessment should be carried out as quickly as possible. In some cases, that could simply be done urbi et orbi or through an international organization with global influence willing to lend assistance for that purpose. If it is impossible at the outset to identify all those presumed to be affected, the State of origin should notify all those which it believes will be affected. If it subsequently appears that another State may also be affected by the transboundary impact, the State of origin should notify it and provide it with the relevant information. If it failed to do so, the State presumed to be affected would be entitled to request consultations under article 18, together with the necessary precautions.

34. The question of the assessment is less problematic, because it does not require the certainty that significant transboundary harm will occur, but only the certainty that a significant risk of such harm exists. The activities concerned will therefore have to be defined as accurately as possible, since both the General Assembly and the Commission have rejected the idea of lists of dangerous activities or of dangerous substances that would make any activity employing them hazardous. In previous reports, the Special Rapporteur suggested that lists of dangerous substances should be included in an annex simply as a guide, to serve as examples of what the general definition embraced and to make it easier to define new activities more accurately. In any case, notification and possible consultations, together with an advisory system of the kind considered below, could help those concerned to reach an appropriate settlement.

(g) Information

35. Under the Code of Conduct on Accidental Pollution of Transboundary Inland Waters, in addition to a general obligation to exchange information on measures adopted, it is recommended in article VI, paragraph 4, that riparian countries should exchange information regarding the authorization of planned activities involving a significant risk of accidental pollution of transboundary inland waters, and the Convention on the Transboundary Effects of Industrial Accidents lists in annex XI, pursuant to article 15, the elements of information that should be exchanged among the parties concerned, such as legislative and administrative measures, programmes for monitoring, planning, and research; experience with industrial accidents, and the development and application of the best available technologies for improved environmental protection and safety. Article 3, paragraph 2 contains the same obligation.

36. Thus, in addition to the information that the State of origin is required to provide while it is processing the request for authorization of an activity that presumably involves risk, the parties must have a general obligation to periodically exchange information concerning the implementation of that activity.

(h) Participation of the public

37. Furthermore, there is a principle which is found in a considerable number of instruments on the transboundary effects of activities carried out in a particular country; it relates to the participation of individuals and private entities that would presumably be affected by the accident. This principle is applied in the first place to the population of the country of origin and stipulates that such population shall be given sufficient information relating to the possible harmful effects of any activity involving risk in order to have the opportunity to participate in the administrative decision-making processes that affect it in a significant manner. But in other instruments, the right is extended to individuals and entities of the affected States. (See article 9 and annex VIII of the Convention on the Transboundary Effects of Industrial Accidents as well as principle 10 of the Rio Declaration on Environment and Development.) In our case, under the principle of non-discrimination, States that offer these possibilities to their own population should naturally extend them to the inhabitants of affected countries on the same conditions as their own population. Since our purpose is to draft universally applicable norms and since there are very considerable differences in levels of development and degrees of political and social awareness among countries and in view of the scope of the issue, we are of the view that an obligation vis-à-vis a country's own inhabitants, should be incorporated in the text along the lines indicated above with the proviso "whenever possible and as appropriate", and that this obligation should be extended to the inhabitants of the affected countries who are in the same situation.

(i) Texts proposed by the Special Rapporteur to replace article 2 of the annex

38. The Special Rapporteur proposes the following articles to replace article 2 of the annex:

"Article 15

Notification and information

If the assessment referred to in the preceding article indicates the possibility of significant transboundary harm:

(a) The State of origin shall notify the States presumed to be affected regarding this situation and shall transmit to them the available technical information in support of its assessment.

(b) Such notification shall be effected either by the State of origin itself or through an international organization with competence in that area if the transboundary effects of an activity may extend to more than one State which the State of origin might have difficulty identifying.

(c) Should it later come to the knowledge of the State of origin that there are other States presumed to be affected, it shall notify them without delay.

(d) States shall, whenever possible and as appropriate, give the public liable to be affected information relating to the risk and harm that might result from an activity subject to authorization and shall enable such public to participate in the decision-making processes relating to those activities.

Article 16

Exchange of information

While the activity is being carried out, the parties concerned shall periodically exchange any information on it that is useful for the effective prevention of transboundary harm."

3. Article entitled "National security and industrial secrets"

(a) Text

39. As a basis for the formulation of this article, the Special Rapporteur has taken the text reproduced below, which closely follows article 3 of the annex.

"National security and industrial secrets

Data and information vital to the national security of the State of origin or to the protection of industrial secrets may be withheld, but the State of origin shall cooperate in good faith with the other States concerned in providing any information that it is able to provide, depending on circumstances."

(b) Commentary

40. This article did not elicit many comments. It was generally noted that it would be acceptable following possible drafting changes. The text is based on article 20 of the draft articles on the law of the non-navigational uses of international watercourses and modifies the text that the Special Rapporteur submitted as article 11 in the fifth report. The Special Rapporteur is well aware of the fact that because of differences between his draft articles and those on the law of the non-navigational uses of international watercourses, the latter provisions cannot always be transposed by analogy to the text under consideration; moreover, his attention has been drawn to that fact on a number of occasions. However, the Commission's commentary to article 20 of the draft articles on the non-navigational uses of international watercourses contains views that seem to be perfectly applicable to the more general context of our articles since, while recognizing the interest of a State in not releasing information vital to its national defence or security, it nevertheless holds the view that the affected (watercourse) State should not be left entirely without information concerning the possible effects of the measures in question:

> "The article is thus intended to achieve a balance between the legitimate needs of the States concerned: the need for the confidentiality of sensitive information, on the one hand, and the need for information pertaining to possible adverse effects of planned measures, on the other." 15/

41. In a much broader context, our article draws upon the final report of the Intergovernmental Working Group of Experts on Natural Resources Shared by Two or More States on a set of "Draft Principles of Conduct in the Field of the Environment for the Guidance of States in the Conservation and Harmonious Exploitation of Natural Resources Shared by Two or More States", which states in paragraph 2 of principle 6:

> "In cases where the transmission of certain information is prevented by national legislation or international conventions, the State or States withholding such information shall nevertheless, on the basis, in particular, of the principle of good faith and in the spirit of good-neighbourliness, co-operate with the other interested State or States with the aim of finding a satisfactory solution". 16/

Likewise, article 22, paragraph 1 of the Convention on the Transboundary Effects of Industrial Accidents stipulates:

15/ See Yearbook ..., 1988, vol. II, (Part Two), p. 54, document A/43/100, chap. III.C, Commentary to article 20.

16/ A/CN.4/406, para. 86. The General Assembly in its resolution 34/186 relating to the above-mentioned principles, which was adopted without a vote on 18 December 1979,

> "Requests all States to use the principles as guidelines and recommendations in the formulation of bilateral or multilateral conventions regarding natural resources shared by two or more States, on the basis of the principle of good faith and in the spirit of good-neighbourliness".

"The provisions of this Convention shall not affect the rights or the obligations of Parties in accordance with their national laws, regulations, administrative provisions or accepted legal practices and applicable international regulations to protect information related to personal data, industrial and commercial secrecy, including intellectual property, or national security." 17/

(c) Text proposed by the Special Rapporteur

42. The Special Rapporteur proposes the following text:

"Article 17

National security and industrial secrets

Data and information vital to the national security of the State of origin or to the protection of industrial secrets may be withheld, but the State of origin shall cooperate in good faith with the other States concerned in providing any information that it is able to provide, depending on the circumstances."

4. Article entitled "Consultations on a regime"

(a) Text

43. As a basis for the formulation of this article, the Special Rapporteur has taken the text reproduced below, which closely follows article 6 of the annex:

"Activities involving risk: consultations on a regime

The States concerned shall enter into consultations, if necessary, in order to determine the risk and amount of potential transboundary harm, aiming at arriving at an arrangement with regard to such adjustments and modifications of the planned activity, preventive measures and contingency plans as will give the affected States satisfaction, on the understanding that liability for the harm caused will be subject to the provisions of the corresponding articles of this instrument."

(b) Commentary

44. It will be recalled that articles 4 and 5 of the annex dealt with activities with harmful effects which would be considered later. That is why we pass directly to article 6 of the annex, which deals with consultations concerning activities involving risk. This is the place for thoroughly examining the nature of consultations with respect to these activities and making a number of comments that are equally applicable to assessment, notification and information; it is better to try to make those points before

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17/ International Legal Materials, vol. XXXI, No. 6, November 1992, p. 1342.

closing this chapter in which these four very closely linked functions occur. Let us recall what was said in the fifth report:

> "It is clear that the kind of procedure which we are considering here involves three functions that are closely linked, no one of which can be divorced from the other two. They are assessment, notification and information concerning an activity referred to in article 1. In some cases, one of the functions is implicitly assumed. How, for example, can a State be notified of certain risks or the harmful effects of an activity unless the State of origin has first made an assessment of the activity's potential effect in other jurisdictions? How can information on the activity be provided without at the same time notifying or without having previously notified the affected State about what is involved? How can one notify someone of certain dangers without providing any information which one may have about it?
>
> Furthermore, consultation with affected States is also linked to these three functions. What is the use of assessment, notification and information if the opinion of the affected State is not to be consulted? As we have already seen, there are limits to the freedom which a State of origin has with respect to activities referred to in article 1, and the limit is to be found at the point where appreciable injury occurs to the rights emanating from the sovereignty of other States, specifically affected States. To the extent that those rights are, or may be, infringed, affected States have some say in respect of activities such as those referred to in article 1. Moreover, what consultations would be possible unless the preceding steps were taken first?" 18/

45. Consultations are therefore needed to complete the process of participation by the affected State, but it is clear that the aim of any consultation is limited in principle by the legal nature of activities involving risk. If such activities are lawful when the State of origin fulfils certain conditions, despite the possible transboundary harm they may cause, the scope of the consultations may be limited: initiation of an activity will be subject neither to any agreements reached during consultations nor to the completion of procedural requirements for prevention; nor in principle can its cessation be requested insofar as it is really an activity involving risk and not an activity with harmful effects disguised as such.

46. The Commission's earlier discussions on the lawfulness or unlawfulness of an activity that may cause transboundary harm gave rise to what in our view is probably a simple misunderstanding. One line of reasoning ran as follows, if the Special Rapporteur understood it properly: if transboundary harm is prohibited - a view possibly supported by Principle 21 of the Stockholm Declaration or by the precedents set in the Trail Smelter case, the Corfu Channel case and others - the question of liability for acts not prohibited would not arise, because all acts leading to transboundary harm would be unlawful, which is the same as saying that they would be prohibited. One of the first normal consequences of such acts, if they take the form of a continuing activity, would be the requirement that they cease.

18/ A/CN.4/423, paras. 73-74.

47. On the other hand, it will be recalled that in our eighth report we had this to say on the subject:

> "With regard to the need to consult at the start of the activity, it is worth analysing how activities involving risk differ from activities with harmful effects: the former create a risk of transboundary harm, the latter cause harm directly; they are activities which by definition cause harm in the course of their normal operation. There is already a considerable body of international theory and practice to support the view that transboundary harm caused by these activities, when significant, is, in principle, prohibited under general international law.". 19/

48. It seems clear that by "these activities" we mean activities with harmful effects and not activities involving risk. This emerges from the passage cited and the whole of paragraph 18 of the eighth report, and from paragraphs 19 and 20, a careful reading of which we recommend to those members who expressed the reservation just discussed. Reviewing the analysis carried out by the jurists of the World Commission on Environment and Development (Brundtland Commission), we said that article 10 of the text they adopted prohibits in principle any transboundary interference that causes substantial harm ("i.e., harm which is not minor or insignificant"). But in paragraph 20, we went on to say:

> "With respect to activities involving risk, the following article, article 11, sets forth the first exception, by means of the concept of balance of interests.
>
> '1. If one or more activities create a significant risk of substantial harm as a result of a transboundary environmental interference, and if the overall technical and socio-economic cost or loss of benefits involved in preventing or reducing such risk far exceeds in the long run the advantage which such prevention or reduction would entail, the State which carried out or permitted the activities shall ensure that compensation is provided should substantial harm occur ... in an area beyond the limits of national jurisdiction.'" 20/

49. We also said, in paragraph 21, that "if the opposing interests occur in the proportions indicated" - that is, the balance of interests tilts in favour of the activity - "there is here a principle of law that authorizes the activity in question to continue or to be undertaken ...". 21/ The position expressed in the discussions does not therefore reflect the view of the Special Rapporteur, who, as can be seen, was very explicit on the point.

19/ A/CN.4/443, para. 18 (emphasis added).

20/ Ibid., para. 20. The quotation is from Environmental Protection and Sustainable Development: Legal Principles and Recommendations, adopted by the Experts Group on Environmental Law of the World Commission on Environment and Development (London, Dordrecht, Boston: Graham and Trotman/Martinus Nijhoff, 1987), p. 75.

21/ Ibid., para. 21.

50. While we have reservations about some aspects of the thinking of the jurists of the Brundtland Commission on this question, the overall thrust of their reasoning, namely that activities involving risk are, under certain conditions, lawful, is not a creation ex nihilo but has a basis in international practice. We said in paragraph 22 of the eighth report:

> "There are dangerous activities which have to be undertaken and which have caused, or threatened to cause, harm to third States. After a while, States have sought legal regimes for such activities to establish the principle of balance of interests; they have generally done so by transferring liability to the individual operators: this has been done with regard to nuclear activity, through several conventions, the transport of petroleum by sea, aviation, accidental and non-accidental transboundary pollution of inland waters and so forth."

The paragraph goes on to give some instances to the contrary, when because of the intolerable risk or harm they created certain activities were ultimately prohibited, as in the case of nuclear-weapon tests in the atmosphere, in outer space and under water, the military or other hostile use of environmental modification techniques, the emplacement of nuclear weapons and other weapons of mass destruction on the seabed and the ocean floor and in the subsoil thereof, and so on. 22/ Of interest here are the examples of international practice cited in footnote 21 of the eighth report, because in the light of such practice it is clear that an activity involving risk is lawful in principle, on condition that the State of origin ensures at least the payment of compensation. Its liability, as the jurists of the Brundtland Commission indicate, can be transferred as a civil liability to those in charge of the activity, normally the operators.

51. Accordingly, consultations should be entered into at the request of the State or States presumed to be affected or possibly at the request of the State of origin itself, but not automatically. The purpose of the consultations, then, will be to provide answers to any questions the State had in mente when it requested them, relating probably to clarification of points that are unclear, further explanations about prevention, or information about conditions in the territory or environment of the affected State, or the like. The latter State might propose a more complete regime governing either prevention, containment of harm (contingency plans, for example, or other forms of cooperation) or liability, or perhaps some measures that in its view would better balance the interests at stake, taking into account, inter alia, the criteria laid down in old article 9 of the annex. A mutually acceptable treaty regime could conceivably be worked out governing everything relating to the activity in question.

52. In response to an opinion put forward in the most recent debate, the Special Rapporteur believes the foregoing makes it clear that the sovereignty of the State of origin is not affected by the obligation to consult, since that is a duty incumbent upon it when it authorizes or undertakes an activity that may cause transboundary harm. It is also clear that the authorization of the affected State is not required before initiation of the activity in question. Hence there is no possibility of a veto by the affected State or States. The

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22/ Ibid., para. 22.

person expressing the aforementioned opinion also emphasized that technical means must be used to assess the activity's potential for causing transboundary harm. The Special Rapporteur confesses that he does not see how else that potential could be assessed. 23/

(c) Text proposed by the Special Rapporteur to replace article 6 of the annex

53. The Special Rapporteur proposes the following article to replace article 6 of the annex:

"Article 18

Prior consultation

The States concerned shall enter into consultations, at the request of any of them and without delay, with a view to finding mutually acceptable solutions regarding the preventive measures proposed by the State of origin, cooperation among the States concerned in order to prevent harm, and any other issue of concern in connection with the activity in question, on the understanding that in all cases liability for any transboundary harm it might cause will be subject to the provisions of the corresponding articles of this instrument."

5. Article entitled "Initiative by the affected States"

(a) Text

54. As a basis for the formulation of this article, the Special Rapporteur has taken the text reproduced below, which closely follows article 7 of the annex:

"Initiative by the affected States

If a State has reason to believe that an activity under the jurisdiction or control of another State is causing it significant harm or creating a significant risk of causing it such harm, it may ask that State to comply with the provisions of article 15. The request shall be accompanied by a technical explanation setting forth the reasons for such

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23/ Let us recall, however, that there is the so-called "precautionary principle" established in Principle 15 of the Rio Declaration on Environment and Development:

"In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."

belief. If the activity is found to be one of those referred to in article 1, the State of origin shall pay compensation for the cost of the study."

(b) Commentary

55. This case differs from the preceding one in that the State presumed to be affected was, for whatever reasons, not notified as provided for in article 2. This may have happened because the State of origin did not perceive the hazardous nature of the activity although the other State was aware of it, or because some effects made themselves felt beyond the frontier, or because the affected State had a greater technological capability than the State of origin, allowing it to infer consequences of which the latter was not aware, or for whatever other reason. In such a case, it is natural that the State presumed to be affected should give the technical grounds for its belief that a specific activity carried out in the State of origin is causing or may cause it significant harm.

56. Some members of the Commission objected to the last sentence of article 7 referring to the passing on of the cost of assessing the transboundary harm if the activity is found to be one of those referred to in article 1. There is, however, a reason for including it: the study providing a proper technical assessment of the hazardousness of the activity in question is, in fact, not free of charge. While the State of origin may not have been at fault in thinking that a given activity did not involve a significant level of risk, once the study shows that the activity was actually a dangerous activity, it is obvious by the same token that the affected State has done some work and incurred costs for which the State of origin should have been responsible, and we do not see why they should be borne by the affected State. We could only accept this if the State of origin was a developing country and the other a developed country, on the grounds that developing countries should be given a measure of special treatment; but not if the reverse is true or if both countries are in the same position. In any case, this should not be made a question of principle, and the material value involved does not warrant our losing time discussing it. It therefore goes without saying that the Special Rapporteur is prepared to delete the last sentence if the Commission considers it advisable.

(c) Text proposed by the Special Rapporteur to replace article 7 of the annex

57. The Special Rapporteur proposes the following article to replace article 7 of the annex:

"Article 19

Rights of the State presumed to be affected

Even when no notification has been given of an activity conducted under the jurisdiction or control of a State, any other State which has reason to believe that the activity is causing it or has created a significant risk of causing it substantial harm may request consultations under the preceding article. The request shall be accompanied by a

technical explanation setting forth the reasons for such belief. If the activity is found to be one of those referred to in article 1, the State of origin shall pay compensation for the cost of the study."

6. Article entitled "Settlement of disputes"

(a) Text:

58. As a basis for the formulation of this article, the Special Rapporteur has taken the following text, which is identical with article 8 of the annex:

> "If the consultations held under articles 3 and 5 above do not lead to an agreement, the parties shall submit their differences for consideration under the procedures for the settlement of disputes set out in Annex ..."

(b) Commentary

59. This draft article elicited a number of comments. Many members believed that it was useful and indeed necessary, but suggested some changes: specifying the articles to be invoked in any settlement procedure, making article 8 more explicit - notwithstanding the fact that it refers to other more explicit articles in the annex, or requiring that the settlement procedure should be speedy. One member was definitely opposed because in cases where consultations resulted in a disagreement, he did not see the need for a procedure to resolve it. In his view, there were likely to be abuses by the affected States as well and this part of the draft should be relegated exclusively to the area of international cooperation. Lastly, there were some proponents of an optional settlement procedure.

60. The Special Rapporteur still believes that a speedy procedure for resolving any impasse occurring at the time of the consultations would be very useful, although it might be better to try to draft an article on the matter at the end of the development of the topic, in order to take into account not only disputes arising on the occasion of the consultations, which seem to merit separate consideration, but also any disputes that might arise as to the interpretation and application of the draft articles. In the case of a settlement procedure for problems arising in relation to these first articles, a means should be devised that is specifically adapted to difficulties that might come up during consultations. We have in mind the major differences of interpretation that could arise regarding the nature of the activity in question. One of the parties, for instance, could maintain that it was not an activity involving risk but rather simply an activity with harmful effects, in which case the possibility of its unlawfulness would be in doubt and the settlement of this difference of opinion would be crucially important for the final fate of the activity; or, on the other hand, the activity could be seen as not involving a real risk of significant transboundary impact; or the parties could differ over the assessment of the actual effects of any of the substances involved in the activity; and so on. In all these possible issues, the opinions of experts seem to be decisive, and it might therefore be a good solution to establish an inquiry commission procedure like the one set out in appendix IV to the United Nations Convention on Environmental Impact Assessment in a Transboundary Context and in annex II to the United Nations Convention on the Transboundary Effects of

Industrial Accidents. In both instruments, the said procedure serves to provide advice to the parties but is at the same time automatic. Article 3, paragraph 7, of the former Convention establishes that "if ... [the] Parties cannot agree whether there is likely to be a significant adverse transboundary impact, any such Party may submit that question to an inquiry commission in accordance with the provisions of Appendix IV to advise on the likelihood of significant adverse transboundary impact, unless they agree on another method of settling this question" (emphasis added). Appendix IV to the Convention establishes a procedure that is to continue until completion, in which both parties entitled to appoint an expert to represent them, but which may begin and continue even if one of the parties does not cooperate in any way.

61. Articles 4 and 5 of the Convention on the Transboundary Effects of Industrial Accidents follow a similar course in establishing that the parties shall first take measures to identify industrial activities within their jurisdiction that are considered hazardous under the Convention and to that end shall consult with the States presumed to be affected in a manner similar to that set out in our own draft articles. The identification of an industrial activity as one covered by the Convention will depend on whether or not it involves the presence of certain hazardous substances listed in annex I, in the specific concentrations and proportions and according to the criteria indicated. If the parties do not agree on whether a given activity is to be identified as one covered by the Convention and if they have not agreed on another method of resolving the question, any of them are entitled to submit it to an inquiry commission for advice. This procedure is exactly the same as the one described in the preceding paragraph.

62. This type of procedure clearly has virtues that recommend it for adoption in other draft texts, even those with a supposedly universal scope. For one thing, it is a touchstone of the good faith of the States that differ on the nature of an activity. Even though it is merely technical, the opinion of an inquiry commission like the one provided for in the Conventions in question has the advantage of being issued by an impartial body and would serve as an element of scientific or technical authority concerning the question submitted to that body. A solution of this kind seems particularly well suited to matters such as those within the scope of our draft articles.

(c) Elements of a proposed future text to replace article 8 of the annex

63. The Special Rapporteur would be very grateful if, during the debate, his colleagues would make clear their opinions on these possibilities, even though a text concretely establishing the proposed procedure is not included, so that he will be in a better position to propose such a text at the appropriate time.

7. Article entitled "Factors involved in a balance of interests"

(a) Text:

64. As a basis in the formulation of this article, the Special Rapporteur has taken the following text, which is identical with article 9 of the annex:

"In the case of the consultations referred to above and in order to achieve an equitable balance of interests among the States concerned in relation to the activity in question, these States may take into account the following factors:

(a) Degree of probability of transboundary harm and its possible gravity and extent, and the likely incidence of cumulative effects of the activity in the affected States;

(b) The existence of means of preventing such harm, taking into account the highest technical standards for engaging in the activity;

(c) Possibility of carrying out the activity in other places or with other means, or availability of other alternative activities;

(d) Importance of the activity for the State of origin, taking into account economic, social, safety, health and other similar factors;

(e) Economic viability of the activity in relation to possible means of prevention;

(f) Physical and technological possibilities of the State of origin in relation to its capacity to take preventive measures, to restore pre-existing environmental conditions, to compensate for the harm caused or to undertake alternative activities;

(g) Standards of protection which the affected State applies to the same or comparable activities, and standards applied in regional or international practice;

(h) Benefits which the State of origin or the affected State derive from the activity;

(i) Extent to which the harmful effects stem from a natural resource or affect the use of a shared resource;

(j) Willingness of the affected State to contribute to the costs of prevention or reparation of the harm;

(k) Extent to which the interests of the State of origin and the affected States are compatible with the general interests of the community as a whole;

(l) Extent to which assistance from international organizations is available to the State of origin;

(m) Applicability of relevant principles and norms of international law."

(b) Commentary

65. This provision did not give rise to major opposition with respect to its content, but there was disagreement as to the form it should take. The Special

Rapporteur notes that most of the positive reactions seem to come from members whose legal training is based on Anglo-American "common law", while some members trained in Continental civil law feel that it should be placed in a non-obligatory annex or in the commentary, or plainly and simply, that it should be deleted. The Special Rapporteur himself, in his sixth report, confessed to "a certain lack of enthusiasm for including such concepts in a body of norms, because they are only recommendations or guidelines for conduct and not genuine legal norms, and because the factors involved in this kind of negotiation are too varied to be forced into a narrow conceptual framework." In retrospect, that confession now appears to reveal his own background in civil law. Nevertheless, he stated in the same paragraph that the provision in question could be included in the draft:

> "It is not unusual to do so, however and incorporating them in our articles, apart from lending some substance to the concept of 'balance of interests' which is, so to speak, behind a number of our texts, and providing guidance to the States concerned, would be of some legal value for assessing the extent to which those States have acted in good faith in the negotiation. It may be useful in this connection to establish whether the State of origin could have conducted an equivalent activity in a less dangerous, although slightly more expensive, way or the extent to which the affected State protects its own nationals from the impact of that or a similar activity. The general paragraph of the article is permissive: the parties may take into account the factors indicated, since doing so would be a matter of free will which can yield only to compulsory norms of international law. Furthermore, so great is the variety of circumstances in each particular case that the States concerned could not be required to take into account the factors included in the article, for some other factor that is not listed may be more relevant in that particular instance. Concerning the list itself, the various subparagraphs are self-explanatory and there is no need for further comment." 24/

66. In a note reproduced here the Special Rapporteur developed his statement that "it is not unusual to do so", i.e., that it is not unusual to include similar norms in conventional instruments: "See the draft on watercourses; article 7 lists the factors which constitute 'equitable and reasonable' utilization of the waters in an international watercourse." In its commentary to article 7 of the draft on watercourses, the Commission - not the Special Rapporteur, Professor McCaffrey - says:

> "The purpose of article 7 is to provide for the manner in which States are to implement the rule of equitable and reasonable utilization contained in article 6. The latter rule is necessarily general and flexible, and requires for its proper application that States take into account concrete factors pertaining to the international watercourse in question, as well as to the needs and uses of the watercourse States concerned. What is an equitable and reasonable utilization in an individual case will therefore depend upon a weighing of all relevant factors and circumstances. This process of assessment is to be performed, in the first instance at least,

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24/ A/CN.4/428, para. 39.

by each watercourse State, in order to assure compliance with the rule of equitable and reasonable utilization laid down in article 6." 25/

67. Incidentally, there are great similarities between article 7 just mentioned and our article: both attempt to give structure to a concept of equity which, without this intermediary, would be so general as to be almost amorphous, and could not be applied to a specific draft. Similarly, in our articles, this balance of interests can only be evaluated in each individual case, taking into account the concrete factors pertaining to the activity in question, as well as to the needs and uses of the States concerned. It is also necessary for each State of origin to conduct a preliminary assessment of the interests at stake, in order to plan its own future action taking them into account.

68. The "balance of interests" meets a basic criterion of equity and means, in broad terms, that the State of origin, which has introduced a certain risk by undertaking or authorizing a dangerous activity, must restore the balance with some contributions on its part. Otherwise it would be obtaining an unfair advantage, especially if harm is actually caused (enrichment without cause, externalization of costs, expropriation, or any other desired designation). In the sixth report, an approximation of the concept was attempted by citing two passages from international decisions, one of the Arbitral Tribunal in the Lake Lanoux case and the other from the Permanent Court of International Justice in the River Oder case. The first says:

> "The Tribunal is of the opinion that, according to the rules of good faith, the upstream State is under the obligation to take into consideration the various interests involved, to seek to give them every satisfaction compatible with the pursuit of its own interests, and to show that in this regard it is genuinely concerned to reconcile the interests of the other riparian State with its own." 26/

The second:

> "[this] community of interest in a navigable river becomes the basis of a common legal right, the essential features of which are the perfect equality of all riparian States in the use of the whole course of the river and the exclusion of any preferential privilege of any one riparian State in relation to the others." 27/

69. We have said that the balance of interests "is behind" many of our texts. Upon rereading this phrase, it now appears too mild to describe the role of this concept in the draft. Actually, it is the very foundation of the draft, gives it meaning and can even serve as an important guiding principle

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25/ Yearbook ... 1987, vol. II (Part Two), p. 36, document A/42/10, para. 1 of the commentary to article 7.

26/ Yearbook ... 1974, vol. II (Part Two), p. 198, document A/5409, para. 1068 (para. 22).

27/ Case concerning territorial jurisdiction of the International Commission of the River Oder, P.C.I.J., Series A, No. 23 (1929), p. 26; cited in the sixth report (A/CN.4/428), note 42.

for reparation. For example, it provides justification for the possibility of dispensing in some cases of liability for risk, with full compensation in integrum restitutio which is the rule of reparation in responsibility for wrongful acts. This function of restitutio could be fulfilled in some cases by making the contribution necessary to restore the balance of interests. But above all, the concept on which we are commenting serves to justify the lawfulness of an activity which, by creating a risk of transboundary harm, would also create the risk of unlawfulness if the possibility of re-establishing equality between the parties in respect of this activity were not available. The very words of the jurists of the Brundtland Commission which we cited earlier, which, in their opinion, give a lawful character to an activity involving risk, appear to be the expression, albeit partial, of a balance of interests between the parties in respect of a specific activity. (Remember: "... if the overall technical and socio-economic cost or loss of benefits involved in preventing or reducing such risk far exceeds in the long run the advantage which such prevention or reduction would entail ...".) In passing, whether or not we agree with the exact formulation of this concept by the jurists of the Brundtland Commission, it is certain that its reasoning appears to reflect international practice in very general terms: an activity involving risk is normally permitted when its usefulness to the State of origin is superior to the harm caused, and even more so if it is also useful to society. But the State of origin must re-establish the balance by reducing the risk created to a minimum, by paying the costs of prevention or seeing that they are paid by those responsible and by compensating for any harm caused or seeing that compensation is provided by those responsible.

70. Therefore, if the above reasoning is valid, it is appropriate to give some guidelines to States as to what factors, among others, are usually involved in the process of balancing the interests of the parties, with the understanding that they are but a few among the many others that could be relevant and that they merely provide guidelines for States in their relations in this field.

(c) Proposal by the Special Rapporteur relating to article 9 of the annex

71. The Special Rapporteur has no definite personal preference as to the best position for this article. As stated, he would prefer not to delete it, and would agree to have it remain in the main text as article 20, given the precedent laid down by the Commission in the case of article 7 of the draft on watercourses.

8. The principle of non-transference of risk or harm

(a) General comments

72. Some instruments, including the Code of Conduct which we have been examining, contain a provision that could be called the principle of non-transference of risk or harm; this provision refers mainly to prevention, but can also be applied to all measures taken in response to transboundary impact, such as the cleaning and rehabilitation of the environment. A rule of this type could be included among the principles, perhaps as part of article 8 of our draft, or else in this chapter, simply as a guideline for preventive

actions. We should like to hear our colleagues' views on where it should be placed. Article II, paragraph 2, of the Code of Conduct on Accidental Pollution of Transboundary Inland Waters states as follows:

> "In taking measures to control and regulate hazardous activities and substances, to prevent and control accidental pollution, to mitigate damage arising from accidental pollution, countries should do everything so as not to transfer, directly or indirectly, damage or risks between different environmental media or transform one type of pollution into another". 28/

73. Article 195 of the United Nations Convention on the Law of the Sea states:

> "In taking measures to prevent, reduce and control pollution of the marine environment, States shall act so as not to transfer, directly or indirectly, damage or hazards from one area to another or transform one type of pollution into another".

There is one difference: this article states "from one area to another", whereas in the instrument cited above, the expression "between different environmental media" is used. Article 195 was taken from Principle 13 of the Marine Pollution Principles endorsed by the Stockholm Conference on the Human Environment:

> "Action to prevent and control marine pollution (particularly direct prohibitions and specific release limits) must guard against the effect of simply transferring damage or hazard from one part of the environment to another". 29/

Another useful instrument is the recent Rio Declaration on Environment and Development, Principle 14 of which appears to give rather more limited scope to this concept:

> "States should effectively cooperate to discourage or prevent the relocation and transfer to other States of any activities and substances that cause severe environmental degradation or are found to be harmful to human health".

In our opinion, this text would be covered by the other, more general one which we are proposing, but perhaps a reference in the commentary would help to make it clearer what the various implications of this principle are.

28/ Op. cit., see footnote 9 above.

29/ See "Law of the Sea Commentary Project", part XII, articles 192-237, p. 195 (July 1989 draft), Center for Oceans Law and Policy, University of Virginia School of Law.

(b) Text proposed by the Special Rapporteur concerning the non-transference of risk or harm

74. We are proposing, for consideration by the Commission, an article 20 bis, which we are leaving in square brackets pending the requested decision regarding its final placement.

["Article 20 bis

Non-transference of risk or harm

"In taking measures to prevent, control or reduce the transboundary effects of dangerous activities, States shall ensure that risks or harm are not transferred between areas or environmental media, and that one risk is not substituted for another".]

9. The "polluter pays" principle

75. The Code of Conduct and the Convention on the Transboundary Effects of Industrial Accidents both contain the "polluter pays" principle. This principle has been examined by the Special Rapporteur, who believes that it should be considered by the Commission for inclusion in our articles, since it plays a very substantial role in both prevention and civil liability. Bearing in mind, however, that the most recent formulations of this principle do not limit it to preventive actions (i.e., by stating that the operator should be liable only for the costs of prevention), but also connect it with reparation, the best place for it might perhaps be among the principles (and not in this chapter on prevention), and the best time to propose it might be next year, so that the Drafting Committee could examine it in a timely manner, together with the other principles it is considering.

III. CONCLUSION

76. The chapters on prevention in conventions dealing with specific topics or activities, such as those which we have been considering, especially in this report, generally contain fairly detailed provisions concerning some aspects which have not been touched upon here, such as emergency preparedness, contingency plans and early warning systems for accidents. The Special Rapporteur has endeavoured to interpret the Commission's view that articles such as those which we are preparing, which are intended to serve only as a framework and to be universally applicable, should be broadly formulated and kept at a fairly general level. For that reason, we believe that with the proposed articles, the chapter on prevention could be concluded.